

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GAREN ARMSTRONG

Claimant

VS.

RE BUILD CONSTRUCTION

Respondent

AND

RIVERPORT INSURANCE COMPANY

Insurance Carrier

Docket No. 1,062,313

ORDER

Claimant requests review of the October 30, 2012 preliminary hearing Order entered by Administrative Law Judge Steven J. Howard. Matthew L. Bretz of Hutchinson, Kansas, appeared for claimant. Steven J. Quinn of Kansas City, Missouri, appeared for respondent and insurance carrier (respondent).

Judge Howard found claimant was not respondent's employee at the time of his August 12, 2012 accident. Judge Howard found claimant evasive and not credible.

The record on appeal is the same as that considered by Judge Howard and consists of the October 30, 2012 preliminary hearing transcript, with exhibits, and all pleadings contained in the administrative file.

ISSUES

Claimant asserts Judge Howard erred in concluding he failed to prove his accident arose out of and in the course of employment. Judge Howard actually denied benefits because claimant was not respondent's employee when he was injured. The Appeals Board considers claimant's appeal to address whether an employer-employee relationship existed between respondent and claimant. Therefore, the sole issue is if claimant was respondent's employee when injured.

Respondent argues Judge Howard's decision should be affirmed.

FINDINGS OF FACT

Respondent was general contractor for a house remodel project financed through HUD. The work concerned Ms. Andrea Richards' house at 12509 W. 74th Terrace.

Claimant testified he was hired by Sean Sparks, the owner of respondent, in May 2012, to do renovation work. He testified such remodeling work included a job at Ms. Richards' house. Claimant asserted he was to perform painting, masonry, siding, exteriors, doors, plaster/drywall, plumbing, electrical and clean-up, but not work on Ms. Richards' roof or pool.¹ At the time renovations began, claimant was engaged to Ms. Richards. They planned to marry and live at Ms. Richards' address.

Claimant and Mr. Sparks agreed claimant would be paid \$3,000 to paint Ms. Richards' house, less the general contractor's fee. Claimant was given approximately 45 days to complete the work. He was to be paid by the job, not by the hour. He was not required to be on the job on any particular day or at any particular hour. Mr. Sparks did not instruct claimant how to paint or scrape.² A HUD inspector would advise if additional painting needed to be performed. Mr. Sparks was only concerned with the outcome of getting the house painted and that the result looked good.

Ms. Richards' house was the only property claimant ever worked on for respondent. Claimant testified respondent supplied equipment, including a 30' extension ladder and saws, and material. He later acknowledged respondent only supplied the ladder. Respondent provided the ladder in response to Ms. Richards' May 6, 2012 e-mail request to borrow a ladder.

Claimant received \$2,680 from respondent on or about June 20, 2012. The "for" section of the check reads, "Richards - Paint Exterior."³ Such payment represented payment in full for painting the house, less the general contractor's fee. Claimant asserted that although he was paid, the house was not completely painted. Claimant endorsed the check over to Mr. Joel Richards, his fiancée's father, to reimburse Mr. Richards for materials he had purchased as part of the renovation.

Mr. Sparks did not request that claimant perform any more painting after June 20, 2012. As of June 25, 2012, respondent had completed all the work that it contracted to perform on Ms. Richards' house and the work had been approved by a HUD inspector.

¹ P.H. Trans. at 11, Cl. Ex. 4 at 1.

² Claimant previously painted with someone named Caesar Mori in the summer of 2011, under the name "KC Paint Pros." P.H. Trans. at 20.

³ P.H. Trans., Cl. Ex. 5 at 1.

Claimant fell from about 15' up a ladder while painting exterior window trim at Ms. Richards' house on August 12, 2012. Either claimant's left ankle got caught in the rung of the ladder and his left leg broke or the ladder fell on his ankle and broke his left leg. Claimant testified he was working for respondent at the time of the accident.

Claimant was transported to Overland Park Regional Medical Center (OPRMC) and diagnosed with open left distal tibia and fibula fractures. Claimant underwent emergency surgery and was discharged on August 15, 2012. Claimant was scheduled to undergo definitive fixation with Molly Black, M.D., on August 21, 2012.

Claimant did not report his accidental injury to respondent. Mr. Sparks learned about claimant's injury by text message from Ms. Richards.

Claimant returned to OPRMC on August 21, 2012 for definitive fixation and external fixator removal by Dr. Black. Claimant was discharged on August 24, 2012.

Claimant developed an infection. He required additional surgeries on September 11, 2012 and September 14, 2012.

Claimant has not worked since the accident. Claimant was living at Ms. Richards' house at the time of the preliminary hearing. They are dating, but no longer engaged.

Mr. Sparks testified that under the terms of a HUD loan, the homeowner is not permitted to work on the house. A general contractor must oversee the work. All work must be done by the general contractor or subcontractors. Respondent's employees' worked on the roof, siding, garage doors, gutter and pool at Ms. Richards' house. A mason did the masonry work. Claimant was paid to paint. Ms. Richards' father was paid for various work. No contractor got paid without a HUD inspection and approval.

Claimant repeatedly testified the painting work was not completed at the time of his fall, even though he had already been paid in full for painting. He acknowledged respondent did not tell him to paint any more after he was paid. Mr. Sparks testified claimant was paid only after the painting was completed and approved by the HUD inspector. Mr. Sparks testified all of the work respondent was contracted to perform on Ms. Richards' house was completed by June 25, 2012.

Claimant acknowledged his intent was to build up "sweat equity" in Ms. Richards' property so *he* would have less of a loan to repay. He testified Ms. Richards somehow started receiving payments from respondent for work that was performed on the house, and thus interfered in his employee-employer relationship with respondent. Claimant testified he expected Ms. Richards to pay him for work he did, using money respondent paid directly to Ms. Richards.

Claimant denied: (1) any ownership interest in the property at 12509 W. 74th Terrace; (2) ever intending to have any ownership or splitting the proceeds of the property with Ms. Richards; or (3) being Ms. Richards' partner in the house rehabilitation project. However, claimant admitted sending the following July 1, 2012 e-mail⁴ to Ms. Richards:

From: Garen Armstrong <garen@mindspringsoftware.com>

Date: Sun, Jul 1, 2012 at 6:56 PM

Subject: 12509 W. 74th- Reimbursement for capital outlay, compensation for work delivered

To: andrearichards06@yahoo.com

Andrea,

I wanted to follow up with you in regards to the house. When we started the project we were to be partners on this house together and split any proceeds or equity. Now that you kicked me out of the house I need to be compensated for my work & reimbursed for my capital outlay.

- Trees- cut down & haul off 3 large trees & Trimmed smaller trees.
- Paint- Power-wash, scrape, Paint
- Electrical- rewired Kitchen for Cabinets, install new lights.
- Tile- Jacked hammered up all tile
- Deck- Rip up old Deck and hauled off
- Deck power-washed and painted and worked on spindles
- Internal paint prep taking down ceilings & outlet covers
- Rip out carpet

\$500 paid for Carpet Installation

\$660 Paid for Stairs

\$600 Home depot/Lowes supplies

Please let me know how you plan to compensate me for work & reimbursed for my capital outlay. I am in hopes that we can find a solution for this swiftly & amicably.

Thank you in advance.

Garen

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b provides, in part:

(c) The burden of proof shall be on claimant to establish claimant's right to an award of compensation and to prove the various conditions on which claimant's right depends. In determining whether claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

⁴ P.H. Trans., Resp. Ex. G.

K.S.A. 2011 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

An employee is "any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer."⁵ The definition of employee does not include self-employed persons, absent an election.

An independent contractor contracts to do certain work based on his own methods, without being under an employer's control, except as to the results or the product of his work.⁶ The main test to determine if an employer-employee relationship exists is if the employer has the right to control, supervise and direct the employee's work: "It is not the actual interference or exercise of the control by the employer, but the existence of the right or authority to interfere or control, which renders one a servant rather than an independent contractor."⁷ The right of control is paramount,⁸ but various factors determine if an individual is an employee or an independent contractor, as set forth in *Hill v. Kansas Dept. of Labor*:⁹

- (1) the right of the employer to require compliance with instructions;
- (2) the extent of any training provided by the employer;
- (3) the extent the worker's services are integrated into the employer's business;
- (4) the requirement that the services be provided personally by the worker;
- (5) the worker's hiring, supervision and paying of assistants;

⁵ K.S.A. 2011 Supp. 44-508(b).

⁶ *Falls v. Scott*, 249 Kan. 54, 64, 815 P.2d 1104 (1991).

⁷ *Id.*

⁸ *Hartford Underwriters Ins. Co. v. Kansas Dept. of Human Resources*, 272 Kan. 265, 270, 32 P.3d 1146 (2001).

⁹ *Hill v. Kansas Dept. of Labor*, 42 Kan. App. 2d 215, 222-23, 210 P.3d 647 (2009), *aff'd in part, rev'd in part* 292 Kan. 17, 23, 248 P.3d 1287 (2011); see also *McCubbin v. Walker*, 256 Kan. 276, 280-82, 886 P.2d 790 (1994).

- (6) existence of a continuing relationship between the worker and employer;
- (7) the degree of establishment of set work hours;
- (8) the requirement of full-time work;
- (9) the degree of performance of work on the employer's premises;
- (10) the degree to which the employer sets the order and sequence of work;
- (11) the necessity of oral or written reports;
- (12) whether payment is by the hour, day or job;
- (13) whether the employer pays business or travel expenses of the worker;
- (14) whether the employer furnishes tools, equipment and material;
- (15) the incurrence of significant investment by the worker;
- (16) the ability of the worker to incur profit or loss;
- (17) whether the worker can work for more than one firm at a time;
- (18) whether the worker's services are made available to the general public;
- (19) whether the employer has the right to discharge the worker; and
- (20) whether the employer has the right to terminate the worker.

ANALYSIS

Claimant was not respondent's employee. Respondent did not exercise control over claimant or have the right of control. Claimant was free to paint as he saw fit and when he chose to do so, all without respondent's supervision or direction.

In reviewing the 20 factors cited in *Hill*, this Board Member finds:

1. Respondent did not have the right to require claimant's compliance with instructions. Claimant presented no examples of respondent providing any instructions.
2. Respondent did not train claimant.
3. Claimant's services were not integral to respondent's business.

4. There is no evidence if claimant was personally required to do the painting.
5. There is no evidence claimant hired helpers to assist him.
6. No continuing relationship existed between claimant and respondent.
7. Claimant was not subjected to work certain days or certain hours.
8. Claimant was not required to work full-time for respondent.
9. There is no proof claimant ever worked at respondent's premises.
10. Respondent did not set the sequence of claimant's work.
11. There is no proof claimant was required to make reports to respondent.
12. Claimant was paid by the job, not by the hour.
13. There is no proof respondent paid claimant travel or business expenses.
14. Claimant provided his own tools. The respondent did not supply anything, apart from letting claimant or his fiancée borrow a ladder.
15. There is no evidence claimant significantly invested in the painting business.
16. Claimant was paid by the job and could therefore incur profit or loss.
17. There is no evidence respondent precluded claimant's ability to contract with other business or individuals.
18. Claimant painted with Mr. Mori in the summer of 2011 under the name "KC Paint Pros." Claimant may have held himself out to the public as an independent contractor.
19. & 20. Claimant testified he was hired by respondent. There is no evidence if he could be fired by respondent.

The foregoing factors establish that claimant was not respondent's employee, and certainly more akin to a self-employed independent contractor. K.S.A. 44-503(a) precludes benefits for a self-employed subcontractor.

Other than claimant's testimony that he was hired by respondent, there was no evidence he was respondent's employee. There is no evidence he filled out a job application, interviewed for a job, filled out tax paperwork or had taxes and social security taken out of his pay. The evidence of an employer-employee relationship is lacking.

There is additional reason to find claimant was not an employee:

- claimant simply signed over respondent's \$2,680 check to his fiancée's father to reimburse him for materials;
- claimant viewed himself as Ms. Richards' business partner in the house and thought he was entitled to split any proceeds or equity in the house;
- claimant invested work in the property to have a smaller house payment;
- claimant looked to Ms. Richards for compensation for his work; and
- claimant was injured doing work approximately one and one-half months after the painting was done and he had already been paid.

None of this behavior mirrors that of an employee. An actual employee would not simply sign over his check to his fiancée's father. A bona fide employee does not view himself as a business partner with the homeowner where the work is performed or think he has ownership interest in the house. A typical employee would not be concerned about the homeowner's mortgage payment. A real employee looks to his employer for monetary compensation, not to his significant other. A legitimate employee would not continue to work about 45 days after being paid for completing the work he was hired to perform.

Finally, Judge Howard is correct that claimant was elusive in providing testimony and not credible. Claimant's July 1, 2012 e-mail to Ms. Richards shows claimant was not truthful when he denied ever intending to have any ownership interest in the property or splitting the proceeds of the property, and denied considering himself partners, with respect to the house, with Ms. Richards. More importantly, the e-mail shows claimant looked to Ms. Richards for compensation, while not looking to respondent for compensation.

CONCLUSION

This Board Member finds claimant was an independent contractor and not respondent's employee.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁰ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.¹¹

¹⁰ K.S.A. 2011 Supp. 44-534a.

¹¹ K.S.A. 2011 Supp. 44-555c(k).

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Steven J. Howard dated October 30, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2012.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

c: Matthew J. Bretz, Attorney for Claimant
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Honorable Steven J. Howard, Administrative Law Judge